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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VISIER, INC., a Delaware corporation,
Plaintiff,
v.
iCIMS, INC., a New Jersey corporation,
Defendant.

CASE NO. 5:24-cv-07544-SVK

**DEFENDANT ICIMS, INC.'S REPLY IN
SUPPORT OF MOTION TO DISMISS OR
TRANSFER BASED ON *FORUM NON
CONVENIENS*; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Filed Concurrently with Declaration of Alan
Law

Judge: Hon. Susan van Keulen
Courtroom: 6
Date: January 21, 2025
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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Visier’s Opposition misses the mark, as the only bases for venue in California cited by Visier are the non-exclusive jurisdiction clause in the parties’ contract and the fact that it filed first, in California. While Visier argues that it is entitled to deference to its chosen forum, Visier does not – and cannot – dispute that none of the parties have a physical presence in California. Rather, the only “tie” to California is the parties’ irrelevant permissive forum selection clause. Further, contrary to the selected citations utilized by Visier in its Opposition, the first-filed doctrine is not a rigid or inflexible doctrine. Rather, and as acknowledged by Visier and argued by iCIMS in its principal Motion, courts in this district routinely look to the factors set forth in 28 USC §1404(a) in determining whether to depart from the rule, including critically the convenience of the parties and witnesses. Here, the balance of relevant factors require dismissal and/or transfer of this action to New Jersey - the *only* appropriate forum for the parties’ dispute.

II. LEGAL ARGUMENT

A. This Court Should Disregard the First-to-File Rule.

Visier’s reliance on the “first-to-file rule” is misplaced because California is not an appropriate venue. The “first-to-file rule” does not trump 28 U.S.C. §1404(a), which allows a district court to transfer a civil action to any district where the case could have been filed for the convenience of the parties and witnesses and in the interests of justice. *See Bozic v. United States Dist. Court*, 888 F.3d 1048, 1054 (9th Cir. 2018) (“the requirements of §1404(a) cabin the exercise of” any discretion a court may have under the first-to-file rule). As set forth below and in iCIMS’ principal motion, the factors under 28 U.S.C. § 1404(a) mandate in favor of transfer, and as such, the first-to-file doctrine should not apply, and this Court should transfer this action to the District of New Jersey.

Further, the first-to-file doctrine “is not a rigid or inflexible rule to be mechanically applied, but rather it is applied with a view to the dictates of sound judicial administration.” *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). A court may dispense of the doctrine

1 based on equitable factors like forum shopping, anticipatory litigation, bad faith and/or the
 2 convenience of the parties and witnesses.” *See Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d 622,
 3 628 (9th Cir. 1991).

4 Here, Visier’s argument that it did not file this action in anticipation of litigation is
 5 disingenuous in light of the July-September 2024 pre-litigation email exchange between the
 6 parties. *See* Declaration of Alan Law (“Law Reply Decl.”) ¶9; Exhibit 5. iCIMS’ email preceded
 7 Visier’s filing of this lawsuit by months, where at least a month prior to filing, Visier sought
 8 additional information from iCIMS about potential setoffs. *Id.* Visier played coy to extract
 9 additional information out of iCIMS and then refused to engage in further discussions, instead
 10 rushing to file in California, while leaving iCIMS to believe Visier intended to try and resolve the
 11 matter. *See Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1100 (N.D. Cal. Mar. 10,
 12 2006) (declining to apply the first-filed rule given anticipatory filing and transferring the action to
 13 the District of New Jersey). Visier’s gamesmanship should not be countenanced, and this Court
 14 should decline to apply the first-to-file doctrine.

15 **B. California is an Inappropriate Forum and this Court Should Transfer this**
 16 **Dispute to New Jersey.**

17 Though Visier appears to spend significant space arguing that iCIMS “cites the incorrect
 18 legal standard” because iCIMS seeks *dismissal* based on *forum non conveniens* grounds, Visier
 19 conveniently ignores that iCIMS did, and does, in fact seek transfer to the District of New Jersey
 20 pursuant to 28 U.S.C. §1404(a) in the alternative to dismissal. *See* Motion, p. 10-11.
 21 Notwithstanding, federal courts, including in this district, routinely interpret domestic motions to
 22 dismiss on *forum non conveniens* grounds as motions to transfer venue, or alternatively, permit the
 23 moving party to seek transfer. *See Skanda Group of Industries, LLC v. Capital Health Partner,*
 24 *LLC*, 2020 U.S. Dist. LEXIS 240314 at *2 (C.D. Cal. Dec. 21, 2020) (noting the “Court interprets
 25 defendant’s motion to dismiss based on *forum non conveniens* as a motion to transfer . . .”);
 26 *Livingston v. Pneu-Logic Corp.*, 2021 U.S. Dist. LEXIS 70463, *15 (N.D. Ca. April 21, 2021)
 27 (granting motion to dismiss based on *forum non conveniens* grounds without prejudice and further
 28

1 allowing moving party to notify court if she would like to transfer to a different deferral district
2 court).

3 Further, the factors that Courts consider when deciding a motion on *forum non conveiens*
4 grounds, as cited in iCIMS' principal motion, are nearly identical to those set forth in 28 USC
5 §1404(a). *Compare* iCIMS' Motion, p. 7 (citing *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d
6 1163, 1180 (9th Cir. 2006) *with* *Teichert v. Church of Jesus Christ of Latter-Day Saints*, 2023 U.S.
7 Dist. LEXIS 166007, *8-9 (C.D. Ca. 2023). While the primary factors to consider are the
8 "convenience of witnesses and parties and concerns for judicial economy," the exhaustive list of
9 factors are as follows:

10 (1) the location where the relevant agreements were negotiated and
11 executed, (2) the state that is most familiar with the governing law,
12 (3) the plaintiff's choice of forum, (4) the respective parties'
13 contacts with the forum, (5) the contacts relating to the plaintiff's
14 cause of action in the chosen forum, (6) the differences in the costs
of litigation in the two forums, (7) the availability of compulsory
process to compel attendance of unwilling nonparty witnesses, and
(8) the ease of access to sources of proof.

15 *See id.* (quoting *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir.2000) and *Right*
16 *to Life of Cent. Cal. v. Bonta*, 614 F. Supp. 3d 729, 733 (E.D. Cal. 2022)).

17 Upon weighing these factors, giving great weight to the primary factors, it is clear that New
18 Jersey is the *only* appropriate forum, and this action should therefore be transferred to the District
19 of New Jersey.

20 First, "the threshold question under section 1404(a) requires the court to determine whether
21 the case could have been brought in the forum to which the transfer is sought." *Inherent.com v.*
22 *Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1098 (N.D. Cal. Mar. 10, 2006). iCIMS has met this
23 threshold burden because this suit could have been brought in the District of New Jersey, which is
24 where iCIMS's fraudulent inducement lawsuit against Visier is presently pending. *See iCIMS, Inc.*
25 *v. Visier, Inc.*, Case No. 3:24-cv-10884-ZNQ-JBD (D.N.J.).

26 Second, the convenience of witnesses and parties and concerns for judicial economy weigh
27 in favor of having the case heard in New Jersey because iCIMS' representatives and witnesses live
28

1 and work in New Jersey. Specifically, iCIMS is a New Jersey corporation with a principal place
 2 of business in New Jersey. *See* Law Reply Decl., ¶3. Though this case is in its infancy stages and
 3 iCIMS has not yet served Visier with its Rule 26 Initial Disclosures, all pertinent witnesses of
 4 iCIMS to be identified in its Initial Disclosures reside and/or work within close proximity to the
 5 District of New Jersey. *Id.* at ¶4. These witnesses include, but are not limited to, Diane Fanelli,
 6 COO; Chris Milan, VP of Professional Services; Shilpi Khare, Professional Services Solution
 7 Architect; and Dave McCarthy, VP Portfolio Director. *Id.* The anticipated testimony of these
 8 witnesses concern the formation of the Contract (including the negotiation of the partnership
 9 between Visier and iCIMS), the implementation of the Visier solution for iCIMS customers, sales
 10 efforts of the product, and the overall relationship and partnership between iCIMS and Visier. *Id.*
 11 As for third-party witnesses, such as former iCIMS employees or independent contractors, it is
 12 anticipated that these witnesses reside in or around New Jersey, whereby the District of New Jersey
 13 would be able to compel their attendance, as opposed to this Court. Further, iCIMS’ books and
 14 records are located within New Jersey, thus providing far greater access to proofs. *Id.* at ¶5.¹

15 Conversely, none of the parties have any physical presence or offices in California, none
 16 of the party representatives or witnesses reside in California, and no documents are located in
 17 California. *Id.* at ¶¶3-8. In fact, Visier has no operating physical office anywhere in the United
 18 States.²

19 Visier’s position that California is more convenient is based solely on its position that the
 20 parties once had offices in the Bay Area and its “breach of contract claims arise in part out of
 21 conduct that occurred in this forum.” *See* Opposition, p. 10. However, the fact that the parties
 22 once had offices in the Bay Area is irrelevant, as neither party currently operates in the Bay Area,
 23 and has not for some time. Further, there can be no dispute that the conduct relevant to this lawsuit
 24

25 ¹ Notably, Visier does not identify any potential witnesses that reside within this District.

26 ² According to California’s Secretary of State business search, Visier has a mailing address in Vancouver,
 27 Canada. Similar, Visier’s most recent Statement of Information filed with California, dated 2022, lists all
 28 officers as located in Vancouver, Canada. Lastly, Visier’s own website reveals no offices within the
 United States. *See* Law Reply Decl., ¶¶6-8, Exhibits 1-4. Further, although the business search appears
 to identify a “principal address” of 548 Market Street, San Francisco CA (Law Reply Decl., ¶6), at best,
 this is an old address, as this current property is abandoned/boarded up. *See id.* at ¶6, Exhibit 2.

1 did not occur in California. iCIMS is headquartered in New Jersey and the substantial part of the
2 events giving rise to the claims thus occurred in New Jersey.³

3 Relatedly, trial would be more expeditious and inexpensive in New Jersey, as compared to
4 California, where all parties and witnesses would need to block substantial time for travel
5 arrangements and re-arrange their work schedules for such substantial time blockage. Litigating
6 in California would also be costly for iCIMS, for these same reasons. Similarly, enforceability of
7 a judgment would present much more difficulty in California, where neither party has assets, as
8 opposed to New Jersey.

9 Visier does not – and cannot- dispute that it will not be prejudiced if this matter is heard in
10 New Jersey since Visier has the same minimal contacts with both California and New Jersey –
11 only being registered to do business in both states.⁴ Accordingly, the critical factors under this
12 Court’s analysis pursuant to 28 U.S.C. §1404(a) weigh in favor of transferring this case to New
13 Jersey.

14 The remaining factors weigh heavily in favor of transferring this case to the District of New
15 Jersey as well. Though Visier suggests that the location where the contract was signed “weighs
16 against transfer,” the contract was not executed within California, a critical fact that Visier does
17 not – and cannot – dispute. Rather, the contract was executed electronically by iCIMS personnel
18 located in New Jersey and, upon information and belief, by Visier representatives located in
19 Canada. *See* Law Reply Decl., ¶¶3, 7.

20 Similarly, while iCIMS does not dispute that the contract contains a California choice-of-
21 law clause, there are no California statutes at play here – rather, the only claims asserted by Visier
22 are breach of contract claims. Visier does not – and cannot – argue that California has some
23 nuanced common law concerning breach of contract claims as opposed to New Jersey.⁵

24
25 ³ Additionally, iCIMS has asserted claims against Visier in the New Jersey action for, among other things,
26 fraud, which undoubtedly occurred in New Jersey.

27 ⁴ Notably, Visier is not up to date on its business registration in California, having failed to file the
required Statement of Information for years 2023 and 2024. *See* Law Reply Decl., ¶7, Exhibit 3.

28 ⁵ Visier’s reliance on *Getz v. Boeing Co.*, 547 F. Supp. 2d 1080 (N.D. Cal. 2008) is inapposite, as that
case involved issues of product liability, not common law breach of contract.

1 Lastly, Visier’s claim that it is entitled to significant deference for its chosen forum is
 2 against the weight of California law, as Visier is essentially a foreign corporation with no current
 3 ties to California.⁶ Rather, Visier’s choice of forum before this Court is entitled to significantly
 4 *less* weight because no party maintains any physical ties to California and the contract only
 5 contains a permissive forum selection clause. Specifically, “[a]s **recognized by the Ninth Circuit,**
 6 **the Supreme Court has explained** in the context of a motion to dismiss on forum non conveniens
 7 grounds that a foreign plaintiff’s [forum] choice deserves less deference than the forum choice of
 8 a domestic plaintiff. Given that the standard for transfer is more easily met than the standard for
 9 dismissal on forum non conveniens grounds, **it is equally appropriate to give less deference to a**
 10 **foreign plaintiff’s forum choice where transfer is sought pursuant to § 1404(a).**”). See *Saleh v.*
 11 *Titan Corp.*, 361 F. Supp. 2d 1152, 1157 (S.D. Ca. 2005) (internal citations omitted); see also *Fox*
 12 *Factory, Inc. v. Sram, LLC*, 2023 U.S. Dist. LEXIS 181554, * 6 (C.D. Ca. February 1, 2023) (in
 13 pulling and analyzing cases, noting that “California district courts have similarly found that a
 14 plaintiff’s home forum is district specific” and thus, “minimal deference” is given to a plaintiff
 15 who sues outside its “home forum”); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (plaintiff’s
 16 chosen forum is only afforded “minimal consideration” when “the operative facts have not
 17 occurred within the forum and the forum has no interest in the parties or subject matter”);
 18 *Hendricks v. StarKist Co.*, 2014 U.S. Dist. LEXIS 41718, at *3 (N.D. Cal. Mar. 25, 2014) (“in
 19 determining the appropriate amount of deference to accord plaintiff’s choice of forum, courts must
 20 consider the extent of the parties’ contacts with the chosen forum, including contacts relating to
 21 the plaintiff’s cause of action.”).

22 It is undisputed that neither Visier nor iCIMS maintain offices in California. Among other
 23 things, Visier’s publicly available corporate filings confirm it has no contacts or any real
 24 connection to California. See Alan Reply Decl., ¶¶6-8, Exhibits 1-4.

25 Further, courts in the Ninth Circuit routinely transfer cases from a plaintiff’s chosen forum,
 26 including those initiated in a permissive forum under the parties’ agreement, to a more appropriate

27 _____
 28 ⁶ Although Visier is incorporated in Delaware, it lacks any meaningful presence in the United States. See Alan Reply Decl., ¶¶6-8; Exhibits 1-4.

forum pursuant to 28 U.S.C. §1404(a). *See e.g., Advanta Corp. v. Dialogic Corp.*, No. C-05-2895, 2006 U.S. Dist. LEXIS 28214, at *20 (N.D. Cal. May 2, 2006) (although plaintiff filed in California pursuant to the contract's non-exclusive jurisdictional clause, the court granted defendant's motion to dismiss under *forum non conveniens* upon finding that plaintiff was entitled to little or no defense to its forum selection and that India provided for a more convenient forum); *Saunders v. USAA Life Insurance Co.*, 71 F. Supp. 3d 1058, 1061 (N.D. Cal. Oct. 17, 2014) (transferring action from the Northern District of California to the Western District of Texas pursuant to the 1404(a) factors); *Lavera Skin Care N. Am., Inc. v. Laverana GmbH & Co. KG*, No. 2:13-cv-02311, 2014 U.S. Dist. LEXIS 176327, at *27 (W.D. Wash. Dec. 19, 2014) (granting motion to dismiss on *forum non conveniens* grounds, reasoning that Germany provided for a more adequate and convenient forum); *Kawamoto v. CB Richard Ellis, Inc.*, 225 F. Supp. 2d 1209, 1217 (D. Haw. Sept. 19, 2002) (applying the 1404(a) factors and transferring action to the Eastern District of California)). Simply put, there mere fact that Visier initiated suit in California one day before iCIMS filed in New Jersey does not override overwhelming inconvenience that would result from litigating the parties' dispute in California.

III. CONCLUSION

For all the foregoing reasons, as well as those set forth in iCIMS' principal Motion, iCIMS respectfully requests that this Court grant this Motion and transfer this action to the U.S. District Court for the District of New Jersey, where a dispute between the parties is already pending.

Dated: January 2, 2025

BERLINER COHEN, LLP

/s/ ALAN LAW

DAWN C. SWEATT

ALAN LAW

ATTORNEYS FOR DEFENDANT ICIMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2025, I filed the foregoing document using the Court's ECF system and served the foregoing document via automatic notice of the ECF system to:

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